Paper No. 9
gfr

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB SEPT. 29,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nature's Finest Foods, LLC

Serial No. 75/341,506

Charles E. Temko of Temko & Temko for Nature's Finest Foods, LLC.

Darlene D. Bullock, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

Before Cissel, Walters and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Applicant seeks registration of the mark shown below for "a frozen sherbet made from evaporated milk" (identification as amended).

The Examining Attorney made final a refusal of registration based on applicant's failure to comply with the requirement that it enter a disclaimer of the phrase ORIGINAL CREME ICE, *see* Section 6 of the Trademark Act, 15 USC §1056, on the ground that this phrase is merely descriptive of the identified goods. Applicant submitted a disclaimer of ORIGINAL and ICE but denies that CREME is descriptive and contests the requirement for a disclaimer of the phrase as a whole.

Applicant has appealed. Both applicant and the Examining Attorney filed briefs, but an oral hearing was not requested.

In its response to the initial refusal, applicant asserts that its product does not contain cream, but admits its consistency resembles that of ice cream. In its appeal brief, applicant states that its product is made with evaporated milk and contrasts its product with "the usual variety of milk based ices and sherbets which are made with ordinary milk or powdered milk." Applicant contends that CREME "suggests that the product has qualities associated with ice cream, rather than sherbert [sic]," but that this "does not directly describe a quality of the product."

We take judicial notice of dictionary definitions evidencing (1) that sherbet may be made with milk, (2) that

evaporated milk is thicker even than whole milk, (3) that cream is the fatty component of unhomogenized milk, and (4) that "creme" is the equivalent of "cream":

> "**sherbet** (shûr'bit), *n*. **1**. a frozen fruit-flavored mixture, similar to an ice, but with milk, egg white, or gelatin added." The Random House College Dictionary 1213 (Rev. ed. 1982).
>
> "**evap'orated milk'**, thick, unsweetened milk made by removing some of the water from whole milk." The Random House College Dictionary 457 (Rev. ed. 1982).
>
> "**cream** (krēm), *n*. **1**. the part of whole milk that is rich in butterfat." The Random House College Dictionary 313 (Rev. ed. 1982).
>
> "**creme** (krem, krēm, krām; *Fr.* krem), *n.* … **1**. cream." The Random House College Dictionary 315 (Rev. ed. 1982).

The Examining Attorney, in her appeal brief, argues that the ingredients in sherbet "normally make it a frozen confection that is lighter than ice cream", and that applicant's use of evaporated milk rather than milk "should give their sherbet a creamier and richer texture" because of increased milk fat.[1] The Examining Attorney also notes that applicant's product need not contain cream for that term to be found descriptive; it is enough that the word describes the creamy texture of the product.

[1] While the suppositions by the Examining Attorney are unsupported by evidence, applicant did not file a reply brief

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. *See*, **In re Abcor Development Corp.**, 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978); *also*, **In re Gyulay**, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered merely descriptive; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. *See*, **In re Bright-Crest, Ltd.**, 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what the

---

and, thus, did not contest these claims. In fact, applicant admits that its product has qualities associated with ice cream.

product is from consideration of the mark alone is not the test." **In re American Greetings Corp.**, 226 USPQ 365, 366 (TTAB 1985).

We assess whether CREME is descriptive of applicant's product from the point of view of the average or ordinary consumer in the class of prospective purchasers for applicant's product. **In re Omaha National Corporation**, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). Since there are no restrictions on the prospective channels of trade or classes of consumers for applicant's product, we assume the average or ordinary consumer includes any retail purchaser of ice cream, sherbet, sorbet or other frozen confections.

In the present case, it is our view that, when "creme" is used in conjunction with a frozen sherbet made from evaporated milk, the term immediately describes, without the need for conjecture or speculation, a characteristic of such goods. Neither exercise of imagination nor gathering of further information is necessary for prospective purchasers to readily perceive the significance of the term. *See*, **In re Quik-Print Copy Shops, Inc.**, 205 USPQ 505, 507 (CCPA 1980)(term descriptive if immediately conveys knowledge of qualities or characteristics of goods; but suggestive if imagination, thought or perception needed to reach conclusion as to nature of goods).

In addition, in the context of applicant's mark, we view ORIGINAL CREME ICE as a unitary phrase. It is well-established that the allowance of separate disclaimers for the several parts of a unitary expression is improper. *See*, **In re Medical Disposables Co.**, 25 USPQ2d 1801, 1805 (TTAB 1992).

Decision:

The refusal of registration, in the absence of a disclaimer of the unitary phrase ORIGINAL CREME ICE, is affirmed.

In accordance with Trademark Rule 2.142(g), this decision will be set aside and the application will be returned to the Examining Attorney to prepare the application for publication for opposition if applicant, within 30 days of the date of this decision, submits an appropriate disclaimer of ORIGINAL CREME ICE.

R. F. Cissel

C. E. Walters

G. F. Rogers

Administrative Trademark Judges, Trademark Trial and Appeal Board